

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2007-0172, Dennis P. Prue, Trustee of Dover Realty Trust v. City of Portsmouth, the court on January 15, 2008, issued the following order:**

The petitioner, Dennis P. Prue, Trustee of Dover Realty Trust, appeals the trial court's order upholding the decision of the City Council of the defendant, the City of Portsmouth, to enact two zoning amendments. One amendment rezoned the property of the intervenor, Harborcorp, LLC, and the other granted relief from certain parking fee ordinances. We affirm.

It is well established that a zoning amendment is presumed to be valid and that the petitioner has the burden of proving that the city council's action was unreasonable and unlawful. Bosse v. Portsmouth, 107 N.H. 523, 530 (1967); see Portsmouth Advocates, Inc. v. City of Portsmouth, 133 N.H. 876, 880 (1991). For its part, the trial court will not set aside the city council's decision to adopt the zoning amendments, absent an error of law, unless it is persuaded by the balance of probabilities, on the evidence before it, that the decision is unreasonable. Quinlan v. City of Dover, 136 N.H. 226, 229 (1992); see RSA 677:6 (1996). We will affirm the trial court's ruling unless it is unsupported by the evidence or erroneous as a matter of law. Miller v. Town of Tilton, 139 N.H. 429, 431 (1995). Our standard of review is not whether we would have found as the trial court did, but whether there is evidence upon which the court could reasonably have based its findings. Quinlan, 136 N.H. at 229.

Zoning changes "can be justified only when they are for the purpose of promoting health, safety, morals, or the general welfare of the community." Bosse, 107 N.H. at 530 (quotation omitted). Further, such changes must be made "in accordance with a comprehensive plan so that zoning is by districts and not by individual pieces of property." *Id.* In determining whether a change is unreasonable or unlawful, "the fact that it is made to a small area and is out of harmony with the comprehensive plan for the good of the community as a whole are elements to be considered." *Id.* However, "[t]he mere fact that the amendment zone[s] a small area at the request of a single owner does not of itself make the result spot zoning." *Id.* (quotation omitted). "What is most determinative is whether the parcel in question is being singled out for treatment unjustifiably differing from that of similar surrounding land, thereby creating an island having no relevant differences from its neighbors." *Id.* (quotations omitted). Lack of public need for the zoning of a small area differently from the surrounding properties from which it has no significant or characteristic

difference is also a factor to be considered in determining whether the zoning is unreasonable or unlawful. *Id.*

The petitioner first argues that the rezoning amendment was unreasonable or unlawful because part of the project, the construction of twenty-one condominium units, will not benefit the public. He asserts that the trial court erred when it found that the city council acted reasonably when it accepted the intervenor's position that the condominium units were necessary to the project and that unless the project was financially viable, the public benefits derived from it would not be realized. As he explains in his brief: "The economic comfort of the Intervenor is the real result produced by the re-zoning[,] which has no substantial relation to any of the police power objectives."

We conclude that the trial court did not err in this respect. Based upon our review of the record, we conclude that it supports the trial court's finding that the city council acted reasonably when it determined that the condominium units were necessary to the project as a whole and that the project as a whole benefits the public.

The petitioner next asserts that the rezoning amendment was unreasonable or unlawful because it primarily benefits the intervenor, was not made in accord with a comprehensive plan and, therefore constituted spot zoning. As the trial court's findings to the contrary are supported by the record, we uphold them. In particular, there was evidence that the rezoning amendment was consistent with the city's master plan. There was also evidence that the proposed project was in the public interest. For instance, there was evidence that the proposed facility would support 144,000 visitor days per year, create over 300 full and part-time jobs, and generate \$700,000 in annual property tax payments and \$16 million in local off-site spending. Further, the Northern Tier Feasibility Study indicated that the project would revitalize the development of the city's northern tier as outlined in the city's master plan. As the respondent aptly notes in its brief:

The rezoning in this case does not create an 'island' of incongruity in the City's zoning scheme. Rather it ties the undeveloped narrow strip of land across the street from [the respondent's] existing Sheraton property to other . . . land [within the same zoning district], to achieve legitimate public purposes in furthering the City's goal in development of downtown parking, over 200 additional hotel rooms, a highly desired convention facility, and related retail development.

The petitioner next contends that the parking fee amendment was unreasonable or unlawful because it does not produce a public benefit. The trial court found, however, that the parking garage "would appear to be a major

public benefit. While the majority of the spaces may have been designated to [the intervenor's] facilities, on a day to day basis it would appear that a majority of those spaces would be available for the public given the fact that the convention center particularly is not going to have events every day of the year." As the record supports these findings, we uphold them and reject the petitioner's assertion that the amendment was not enacted to benefit the public.

Finally, the petitioner argues that the trial court erred when it declined to find that the city council had a conflict of interest. "A conflict of interest exists if an official has a direct interest in the outcome of a proceeding, or any connection with the parties in interest, as would be likely, improperly, to influence his or her judgment." Appeal of City of Keene, 141 N.H. 797, 801 (1997) (quotations, citation and brackets omitted). While "[a] judicial or quasi-judicial act may be voided because of a conflict of interest, . . . an administrative or legislative act need not be invalidated if the conflicting interest did not determine the outcome." Town of Merrimack v. McRay, 150 N.H. 811, 813 (2004). Amending a zoning ordinance is a legislative act. Quinlan, 136 N.H. at 231-32.

Here, the record supports the trial court's finding that the city council had no conflict of interest. That the development at issue was a public-private partnership "hardly constitutes a substantial, direct and personal pecuniary interest which might serve to influence improperly" the city council's decision to adopt the amendments. Appeal of Comm. to Save the Upper Androscoggin, 124 N.H. 17, 26-27 (1983).

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,  
Clerk**